I&P SERIEMAS SDN BHD & ANOR v. TENAGA NASIONAL BHD & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: B-01-9-01-2014]
16 NOVEMBER 2015

ADMINISTRATIVE LAW: *Judicial review – Appeal – Acquisition of land for purpose of upgrading transmission line – Compensation awarded by District Land Officer – Quantum – Appeal by landowners to State Authority – Whether State Authority exceeded its jurisdiction in making order of acquisition under s. 13 of Electricity Supply Act 1990 – Whether Statutory Authority permitted to make such order under law*

LAND LAW: *Acquisition of land – Compensation – Land acquisition for purpose of upgrading transmission line – Appeal by landowners to State Authority against compensation awarded by District Land Officer – Refusal of State Authority to review – Whether State Authority exceeded its jurisdiction in making order of acquisition under s. 13 of Electricity Supply Act 1990 – Whether Statutory Authority permitted to make such order under law – Whether project entailed installation of new lines over lands or mere upgrading – Electricity Supply Act 1990, ss. 2, 11, 13, 16 & 19*

The first respondent, Tenaga Nasional Berhad ('TNB') proposed to commence a project to upgrade its transmission line ('the project'). The lands affected by the project included those belonging to the appellants. Acting pursuant to s. 13 of the Electricity Supply Act 1990 ('ESA'), TNB communicated its intention to enter the lands to the Pengarah Tanah Galian Selangor and the appellants. At an enquiry held by the Pegawai Tanah Daerah ('PTD') Kuala Langat, a compensation of RM1,670,127 was awarded. Dissatisfied, the appellants lodged an appeal to the Majlis Mesyuarat Kerajaan Negeri Selangor ('State Authority'). The State Authority refused to review the amount of compensation made by the PTD and ordered TNB to acquire the lands under the Land Acquisition Act 1960. TNB then applied for a judicial review at the High Court, against the State Authority's decision. In quashing the decision of the State Authority, the High Court held that the State Authority had exceeded its jurisdiction in making an order for TNB to acquire the lands as s. 13 of the ESA does not permit it to make such order. Hence, the present appeal. The appellants submitted that TNB ought to have relied on s. 11 and not s. 13 of the ESA because the project entailed installation of new lines over the lands and not mere upgrading, as suggested by TNB.

Held (allowing appeal with costs; setting aside order of High Court and affirming decision of State Authority)
Per Rohana Yusuf JCA (for the majority):

(1) Under the ESA, the right to enter under s. 13 differs from that of s. 11. Under s. 13, TNB may enter any land for the purpose of maintaining or upgrading work while under s. 11, it is for the purpose of installing or constructing. Whether a case falls within s. 11 or s. 13 is indeed a question of fact in each particular case. The State Authority would be in the position to determine if a case falls within either section before determining the appropriate order to be made. (paras 6 & 9)

(2) The State Authority had decided that the appropriate order was for an acquisition and not compensation. It was the finding of the State Authority that adding additional lines in this case was an installation of new lines and not mere upgrading within the definition of 'upgrade' under s. 13 of the ESA. That being the case, the entrance upon the lands by TNB ought to be one under s. 11 and not s. 13 of the ESA. (paras 9 & 11)

(3) TNB ought to have utilised s. 11 of the ESA. Had TNB done so, the order of the State Authority would fall within s. 19 of the ESA which was indeed an appropriate order for the State Authority to make. In the circumstances of this case, the State Authority was not seized with any authority to make an order for TNB to acquire the lands. However, it would be unjust if the decision of the State Authority were disturbed just because of the wrong procedure adopted by TNB in the first place. (paras 14 & 16)

(4) In exercising the appellate power under s. 16 of the ESA, the State Authority is empowered to deal with appeals on compensation payable under both ss. 11 or 13 of the ESA. It follows therefore that the State Authority is empowered to deal with appeals under either section and make its order accordingly. The impugned order was not one which was outside the jurisdiction of the State Authority. The impugned order was one which was supported by the objective assessment of the facts, taking into consideration all the relevant facts, supported by sound reasoning. It was not a decision that suffered from any illegality. (paras 12 & 17)

Per Hamid Sultan Abu Backer JCA (dissenting):

(1) There was no appealable error in this case. On the facts of the case, s. 11 would not be applicable as the entry was not a first entry by TNB. (paras 19 & 26)

(2) Where the entry was made under s. 13 of the ESA, the State Authority has no power to order acquisition. If the State Authority had acted outside its powers given in the legislation, that conduct is referred to as *ultra vires*. (para 26)

(3) If the appellants' position was that the entry should not be made under s. 13 of the ESA, then it was entitled to compensation and/or order of acquisition until the decision of TNB to enter under s. 13 was set aside and TNB is directed to comply with the law, as provided by s. 11. That is to say, the entry by TNB was wrongful and *ultra vires* the ESA. (para 26)

Bahasa Malaysia *Headnotes*

Responden pertama, Tenaga Nasional Berhad ('TNB') bercadang untuk memulakan projek meningkatkan talian bekalannya ('projek'). Tanah yang menerima kesannya termasuk tanah milik perayu-perayu. Bertindak menurut s. 13 Akta Bekalan Elektrik 1990 ('ABE'), TNB memaklumkan niatnya untuk memasuki tanah tersebut kepada Pengarah Tanah Galian Selangor dan perayu-perayu. Berdasarkan siasatan yang dijalankan oleh Pegawai Tanah Daerah ('PTD') Kuala Langat, pampasan berjumlah RM1,670,127 diberikan. Tidak berpuas hati, perayu-perayu merayu kepada Majlis Mesyuarat Kerajaan Negeri Selangor ('Pihak Berkuasa Negeri'). Pihak Berkuasa Negeri enggan menyemak semula jumlah pampasan yang diberikan oleh PTD dan memerintahkan TNB mengambil tanah tersebut menurut Akta Pengambilan Tanah 1960. TNB seterusnya memohon semakan kehakiman di Mahkamah Tinggi terhadap keputusan Pihak Berkuasa Negeri. Dalam membatalkan keputusan Pihak Berkuasa Negeri, Mahkamah Tinggi memutuskan bahawa Pihak Berkuasa Negeri melampaui bidang kuasanya dalam memerintahkan TNB mengambil tanah kerana s. 13 ABE tidak memberikan apa-apa kebenaran kepadanya untuk mengeluarkan perintah sedemikian. Oleh itu, rayuan ini. Perayu-perayu menghujahkan bahawa TNB sepatutnya mengguna pakai s. 11 dan bukan s. 13 kerana projek melibatkan pemasangan talian baru atas tanah dan bukan sekadar peningkatan, seperti yang dinyatakan oleh TNB.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi dan mengesahkan keputusan Pihak Berkuasa Negeri) Oleh Rohana Yusuf HMR (keputusan majoriti):

(1) Menurut ABE, hak untuk masuk di bawah s. 13 berbeza dengan s. 11. Di bawah s. 13, TNB boleh memasuki mana-mana tanah bagi menjalankan kerja-kerja menyenggara atau peningkatan manakala di bawah s. 11, tujuannya adalah untuk pemasangan atau pembinaan. Sama ada kes terangkum dalam ss. 11 atau 13 sememangnya satu persoalan fakta dalam setiap kes. Pihak Berkuasa Negeri perlu memutuskan sama ada kes terangkum dalam salah satu seksyen sebelum memutuskan perintah bersesuaian yang harus dibuat.

(2) Pihak Berkuasa Negeri memutuskan bahawa perintah yang sesuai adalah pengambilan tanah dan bukan pemampasan. Pihak Berkuasa Negeri berpendapat bahawa penambahan talian tambahan dalam kes ini adalah pemasangan talian baharu dan bukan sekadar peningkatan seperti yang

dimaksudkan oleh 'peningkatan' di bawah s. 13 ABE. Oleh itu, kemasukan oleh TNB sepatutnya dibuat di bawah s. 11 dan bukan s. 13 ABE.

(3) TNB sepatutnya mengguna pakai s. 11 ABE. Jika TNB bertindak sedemikian, perintah Pihak Berkuasa Negeri terangkum dalam s. 19 ABE yang sememangnya perintah bersesuaian untuk dibuat oleh Pihak Berkuasa Negeri. Dalam hal keadaan kes ini, Pihak Berkuasa Negeri tidak mempunyai kuasa untuk mengarahkan TNB mengambil tanah tersebut. Walau bagaimanapun, tidak adil jika keputusan Pihak Berkuasa Negeri diganggu hanya kerana TNB mengguna pakai tatacara yang salah.

(4) Dalam menjalankan kuasa rayuan di bawah s. 16 ABE, Pihak Berkuasa Negeri mempunyai kuasa mendengar rayuan mengenai pampasan yang perlu dibayar di bawah ss. 11 atau 13 ABE. Susulan itu, Pihak Berkuasa Negeri mempunyai kuasa mendengar rayuan di bawah kedua-dua seksyen dan mengeluarkan perintah yang wajar. Perintah yang dipersoalkan bukan luar bidang kuasa Pihak Berkuasa Negeri. Perintah yang dipersoalkan disokong oleh penilaian fakta secara objektif, mengambil kira fakta relevan, disokong oleh dapatan munasabah. Ia bukan keputusan yang tercemar dengan ketaksahan.

Oleh Hamid Sultan Abu Backer HMR (menentang):

(1) Tiada kekhilafan untuk dirayu dalam kes ini. Berdasarkan fakta kes, s. 11 tidak terpakai kerana kemasukan oleh TNB bukan kemasukan kali pertama.

(2) Apabila kemasukan dibuat menurut s. 13 ABE, Pihak Berkuasa Negeri tidak mempunyai kuasa untuk memerintahkan pengambilan tanah. Sekiranya Pihak Berkuasa Negeri bertindak luar kuasa yang diberikan kepadanya di bawah perundangan, tindakan tersebut *ultra vires*.

(3) Jika perayu-perayu berpendapat bahawa kemasukan tidak sepatutnya dibuat di bawah s. 13 ABE, maka mereka berhak mendapat pampasan dan/atau perintah pengambilan tanah hingga keputusan TNB memasuki tanah di bawah s. 13 diketepikan dan TNB diperintahkan mematuhi undang-undang, seperti yang diperuntukkan oleh s. 11. Maksudnya, kemasukan oleh TNB salah dan *ultra vires* ABE.

Case(s) referred to:

Majlis Perbandaran Subang Jaya v. Laguna De Bay Sdn Bhd [2015] 1 CLJ 357 CA ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, ss. 11(1), (8), (9), 13, 16(1), (2), 19

For the appellant - Mohd Izral Khairy (Sri Lachman Kumar with him); M/s Izral Partnership
For the 1st respondent - Hadi Mukhlis; M/s Shook Lin & Bok
For the 2nd to 5th respondents - Ahmad Fuad Othman; FC

[Appeal from High Court, Shah Alam; Judicial Review No: 25-57-2011 (overruled)]

Reported by Najib Tamby

JUDGMENT

Rohana Yusuf JCA:

Majority

[1] This appeal emanates from a decision of the High Court at Shah Alam in allowing a judicial review application made by the respondent. The subject matter of the judicial review was a decision by the Majlis Mesyuarat Kerajaan Negeri Selangor on an appeal made by the appellants pursuant to the Electricity Supply Act 1990 (ESA).

[2] After hearing the appeal, by a majority decision, we allowed the appeal, with our learned brother, Dr Haji Hamid Sultan bin Abu Backer JCA dissenting.

[3] The brief facts leading to the application for judicial review before the High Court were these. Around April 2007 the first respondent, Tenaga National Berhad (TNB) proposed to commence a project to upgrade its transmission line from PMU Olak Lempit to Banting in Selangor (the project). The land affected by the project includes the land belonging to the first appellant, I & P Seriemas Sdn Bhd and the second appellant Dusun Durian Plantations Ltd, respectively. Both the appellants' land shall collectively be referred to as "the lands". TNB, purportedly acting in pursuant to s. 13 of the ESA *vide* a letter dated 13 April 2007 notified the Pengarah Tanah Galian Selangor of its intention to enter into the lands. Both the appellant landowners were also notified by letters of 30 April 2009.

[4] An enquiry to determine the necessary compensation to the appellants was held by the Pegawai Tanah Daerah (PTD) Kuala Langat pursuant to s. 16(1) of the ESA. Both landowners as well as TNB were notified to attend. At the enquiry held on 27 May 2007, PTD Kuala Langat awarded a compensation of RM1,670,127. Dissatisfied with the decision and pursuant to s. 16(2) of the ESA, the appellants lodged an appeal with Majlis Mesyuarat Kerajaan Negeri Selangor (The State Authority). Having heard the appeal of the appellants, the State Authority in its 16 December 2011 decision ordered TNB to acquire the lands under the Land Acquisition Act 1960 and refused to review the amount of compensation made by PTD Kuala Langat instead. TNB then applied for a judicial review of the State Authority's decision.

[5] The learned High Court Judge reviewed the decision and held that the State Authority had exceeded its jurisdiction in making an order for TNB to acquire the lands. His Lordship found that s. 13 of the ESA does not permit the State Authority to make such order. The decision of the State Authority stood quashed by the High Court.

[6] The scheme of things in relation to entry by TNB on any land under ESA is provided in s. 11 and s. 13. It must be noted that the right to enter under s. 13 differs from that of s. 11. Under s. 13 TNB may enter any land for the purposes of maintaining or upgrading work, whereas under s. 11 it is for the purpose of installing or constructing.

[7] The power of the District Land Administrator to assess the compensation payable under s. 16 is for both compensation due either under s. 11 and 13, which must be made in the form set out in the third schedule of the ESA. Under both s. 11 and s. 13, the decision of the Land Administrator may be appealed upon to the State Authority. For an entry under s. 11 the State Authority upon an appeal, may direct for the affected land to be acquired *in lieu* of compensation (see s. 11(9) ESA).

[8] The main thrust of the appeal by the appellants was that the first respondent had wrongly relied on s. 13 to enter upon the lands purportedly for purposes of maintenance. The appellants submitted that the first respondent ought to have relied on s. 11 and not s. 13 because the project in fact entailed installation of new lines over the lands and not mere upgrading as suggested by the first respondent. It was further contended that TNB should not be allowed to benefit from its own wrong. Learned counsel relied on the case of *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489.

[9] It is plainly clear that whether a case fall within s. 11 or s. 13 is indeed a question of fact in each particular case. The State Authority would be in a position to determine if a case falls within either section before determining the appropriate order to be made. In the present appeal before us it is quite obvious that the State Authority had decided that the appropriate order is for an acquisition and not compensation. In arriving at its decision it was deposed in the affidavit of Dato' Haji Mohammed Khursin bin Haji Munawi affirmed on 2 July 2012 at p. 112 of the Appeal Record Jilid 2(1) on behalf of the State Authority at paras. 7, 8 and 9 that the project entailed more than a mere upgrading. In the said affidavit it was explained as follows:

> 7. Setelah membincangkan rayuan Responden Kelima, Responden Kelima berpandangan kesan-kesan kerosakan selain dari kacau ganggu semasa kerja-kerja pembinaan yang diakibatkan dari kerja-kerja menaiktaraf talian penghantaran 132Kv adalah kekal dan selama-lamanya. Kesan-kesan tersebut antaranya adalah seperti berikut:

(i) Kerja-kerja menaik taraf tersebut melibatkan kerja-kerja pembinaan yang baru;

(ii) Penggunaan ruang kawasan tanah yang lebih besar digunakan untuk membina tiang rentis yang lebih besar dan tinggi;

(iii) Penggunaan ruang kawasan tanah yang lebih besar menjejaskan lagi keupayaan tanah yang boleh digunakan;

(iv) Penjejasan potensi pembangunan tanah masa hadapan kerana terdapat bebanan rentis yang lebih besar binaan dan lebih tinggi kuasa voltannya;

(v) Menjejaskan nilai pasaran tanah masa hadapan kerana terdapat bebanan rentis yang lebih besar binaan dan lebih tinggi kuasa voltannya;

(vi) Kemungkinan yang lebih untuk mendapat kesan sampingan terhadap kesihatan akibat "electro magnetic force" ("EMF") yang lebih tinggi kuasa voltannya;

(vii) Sebarang aktiviti dalam dan/atau berhampiran dengan kawasan rentis hendaklah mematuhi syarat-syarat yang ditetapkan oleh Pemohon dan perlu mendapat kebenaran Pemohon terlebih dahulu;

(viii) Sebarang aktiviti, binaan dan/atau tanaman yang tidak mematuhi syarat-syarat yang ditetapkan oleh Pemohon dan/atau tidak mendapat kebenaran Pemohon boleh diruntuh dan/atau dimusnahkan dan boleh dikenakan denda dan/atau kompaun;

(ix) Pendedahan kepada risiko bahaya tiang rentis tumbang dan renjatan eletrik; dan

(x) Kesemua had, kesan dan/atau penjejasan di perenggan (i) hingga (x) di atas adalah kekal berterusan selagi mana binaan rentis tersebut berada di atas tanah tersebut.

8. Berikutan dengan kesan-kesan tersebut responden pertama berpandangan bahawa pampasan yang menasabah adalah merupakan nilai pasaran semasa tanah yang terlibat dan oleh itu adalah lebih patut tanah tersebut dibuat pengambilan tanah di bawah Akta Pengambilan Tanah 1960.

9. Selanjutnya melalui pengambilan tanah, tanah responden kelima yang diambil akan menjadi milik pemohon berbanding sekiranya rayuan responden kelima untuk mendapatkan 100% nilai pasaran semasa dibenarkan, tanah tersebut masih menjadi milik responden kelima dan pemohon hanya mendapat hak izin lalu sahaja.

[10] Both learned counsel cited to us the Federal Court case of *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1 to contend as to the meaning of upgrading as contemplated by s. 13 of the ESA. In this case the Federal Court states that the construction of the term "upgrade" under s. 13

should not be restrictive, and that the term upgrade would mean the "raising in rank or improvement by replacing components, obviously for the purpose of better performance". The relevant passage from that case reads as follows:

> It must be observed that the meaning of the word "maintain" carries with it the element of repair. This has been recognized in cases such as *Cross v. Kirkless Matropolitan Borough Council* [1998] 1 All ER 564 where it was held that "maintain" includes "repair". As "maintain" and "repair" have been enacted as separate items in s. 13 of the Act the meaning of the word "maintain" must be deemed to exclude the element of repair. It thus refers to only the act of supervising to ensure that a thing is preserved for the purpose for which it was designed. It therefore does not involve the carrying out of any physical work. The work "repair" refers to the restoration of something to a good condition after it has been damaged. The amount of restoration work that is needed may vary from case to case. The word "upgrade" is quite different from "repair" as it refers to the raising in rank or improvement by replacing components, obviously, for the purpose of better performance.

[11] In the present appeal it is not in dispute that additional lines were added to existing lines. It was the finding of the State Authority on the facts before it that adding additional line in this case is an installation of new lines and not mere upgrading within the definition of the term "upgrade" under s. 13. That being the case the entrance upon the lands by TNB ought to be one under s. 11 and not s. 13 of ESA.

[12] We agree with the submission of Assistant State Legal Adviser of Selangor representing the second to fourth respondents firstly, in exercising the appellate power under s. 16 of the ESA the State Authority is empowered to deal with appeals on compensation payable under both s. 11 or s. 13 of the ESA. It follows therefore that the State Authority is empowered to deal with appeals under either section and make its order accordingly.

[13] The law and the role of a judge in a judicial review application is trite. A court under a judicial review exercise is not entitled to consider whether a decision is fair and reasonable because it does not concern itself with the decision but the decision making process. Such a restriction on the court must be observed to prevent the potential abuse of usurping the power of a tribunal or decision-making body. A decision supported by sound and proper reasoning should not be reviewed by a court as decided in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753. In that case the Federal Court had stated that in exercising judicial review the High Court would not be oblige to interfere with the findings of the Industrial court unless found to be unreasonable in the sense that no reasonable person would come to that conclusion.

[14] We are in agreement with the appellants' submission that the first respondent ought to have utilised s. 11 of the ESA instead. Had the first respondent done so the order of the State Authority will fall within s. 19 of

ESA which is indeed an appropriate order for the State Authority to make. The State Authority in the circumstances of this case therefore is not seized with any authority to make an order for TNB to acquire the lands.

[15] As we have alluded to earlier, the reasons for the State Authority to make the impugned order are well stated in the affidavit of Dato' Haji Mohammed Khursin bin Haji Munawi. In the exercise of its power, in our view the State Authority had taken into account relevant consideration. Of particular importance was the fact that in essence, the project would be permanent in nature and would affect the use of the lands by the appellants. It would have adverse effect on the future value of the lands besides the potential impact on health resulting from the 'electronic magnetic force'. In other words financial compensation would not suffice to the appellants.

[16] We further agree with learned counsel that the first respondent cannot rely on its own wrong (see *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489). It would be unjust if the decision of the State Authority were disturbed just because of the wrong procedure adopted by the first respondent in the first place.

[17] For the reasons we stated above in our view the impugned order is not one, which is outside the jurisdiction of the State Authority. The impugned decision was one, which was supported by the objective assessment of the facts taking into consideration all the relevant facts supported by sound reasoning. It is not a decision that suffers from any illegality.

[18] Premised on the above we allowed the appeal with costs of RM25,000 to each of the appellants. We set aside the order of the High Court and affirmed the decision of the State Authority.

Hamid Sultan Abu Backer JCA:

[19] The appellants appeal against the decision of the learned High Court judge who quashed the decision of the State Authority on the grounds it was *ultra vires* the Electricity Supply Act 1990 (ESA 1990), came up for hearing on 4 August 2014. Upon hearing the appeal, by majority, my learned brother Mohd Hishamudin bin Mohd Yunus JCA and learned sister Rohana binti Yusuf JCA allowed the appeal. I took the view that there was no appealable error and in consequence I dismissed the appeal with costs.

Brief Facts

[20] The facts of the case has been set out in the majority decision and I do not wish to repeat the same, save to say: (i) the appellants were landowners; (ii) first respondent (Tenaga) entered the land pursuant to s. 13 ESA 1990; (iii) the appellants were entitled for compensation under s. 13 and assessment procedure is set out in s. 16; (iv) the land administrator assessed the compensation at RM1,670.127; (v) the appellants were not happy with the compensation and took the view that Tenaga should have entered the land

pursuant to s. 11 and the state authority should on the facts of the case order acquisition pursuant to s. 11(8) of ESA 1990; (vi) the state authority agreed with contention of the appellant and ordered the acquisition of the property; (vii) Tenaga filed an application for judicial review on the grounds that the decision of the state authority was *ultra vires* ESA 1990; (viii) the learned High Court Judge quashed the decision of the state authority.

Jurisprudence Relating To ss. 11 And 13

[21] Sections 11 and 13 give power to enter the land for purpose stated in ESA 1990. Section 11 relates to a situation *inter alia* where the entry is made for the first time and in that circumstances the section permits to allow compensation to the land owner or the state authority may order the acquisition of the land. Section 13 relates to a situation where Tenaga has already entered the land earlier but wants to maintain, repair or upgrade; then the land owner is entitled to compensation only. The distinction between the two sections is like apple and orange.

[22] If at all, Tenaga enters the land for the first time pursuant to s. 13, then the landowner ought to object on the grounds the whole procedure of Tenaga is *ultra vires* the Act. The landowners cannot choose to ask for compensation or acquisition of the land.

[23] In the instant case, it must be noted that the appellants had not objected on the grounds that the procedure employed by Tenaga was *ultra vires* the Act. The appellants' argument was that the entry ought to be under s. 11. It does not lie in the mouth of the appellants to do so save to object to the *ultra vires* act employed to enter the land.

[24] The relevant part of the said ss. 11(1) and 11(8), 13 and 16 read as follows:

Section 11(1) ESA 1990 reads as follows:

> 11. (1) Subject to as hereinafter provided, whenever it is necessary so to do for the purpose of installing any system of distribution of energy under this Act, a licensee may lay, place or carry on, under or over any land, other than State land, such posts and other equipment as may be necessary or proper for the purposes of the licensed installation, as the case may be, and may take such other action as may be necessary to render the installation safe and efficient, paying full compensation in accordance with section 16 to all persons interested for any disturbance, damage or disability that may be caused thereby and such compensation may include an annual payment for land used for the purpose of the posts or other equipment.

Section 11(8) ESA 1990 reads as follows:

> (8) The State Authority may, if it thinks fit, *in lieu* of making an order under subsection (7), direct the acquisition of any land or part of any land included in a notice given under subsection (2).

Section 13 of ESA 1990 states:

> 13. Whenever it is necessary so to do for the purpose of Main maintaining, repairing or upgrading any licensed installation or any part thereof, the licensee, or any person authorized by him in that behalf, may at all reasonable times enter upon any land on, under or over which supply lines have been laid, placed or carried, or upon which posts or other equipment have been erected, and may carry out all necessary repairs, and may, in the course thereof, fell or lop trees, remove vegetation and do all other things necessary to the said purpose, causing as little damage as possible and paying full compensation in accordance with section 16 to all persons interested for any damage that may be caused thereby for which compensation has not already been assessed under section 11.

Section 16 of ESA 1990 reads as follows:

> 16. (1) The amount of compensation, if any, payable under section 11 or 13 shall be assessed by the District Land Administrator after such enquiry as he shall deem sufficient. The assessment shall be substantially in the form set out in the Third Schedule:
>
> Provided further that no compensation shall be payable by the licensee in respect of any tree within fifty feet of the centre line of any road constructed or maintained by the State Government or by any local authority unless it is proved that the tree was in existence prior to the construction of the road.
>
> (2) Any person aggrieved with the District Land Administrator's assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.

[25] It is important to note that if the landowner does not make a proper objection as per the law, the landowner will not be entitled to any remedy under s. 16 of ESA 1990.

[26] I have read the memorandum of appeal, the appeal record and the submissions of parties in detail. I take the view that the appeal must be dismissed and the order of the High Court must be sustained. My reasons *inter alia* are as follows:

(i) In the instant case, where the entry was made under s. 13 of ESA 1990, the state authority has no power to order acquisition. If the state authority had acted outside its powers given in the legislation that conduct is referred to as '*ultra vires*'. Support for the proposition can be found in a number of cases. (See *Majlis Perbandaran Subang Jaya v. Laguna De Bay Sdn Bhd* [2015] 1 CLJ 357; [2015] 2 MLJ 509).

A (ii) If the appellants' position is that the entry should not be made under s. 13, then it is not entitled to compensation and/or order of acquisition until the decision of Tenaga to enter under s. 13 is set aside and Tenaga is directed to comply with the law as provided by s. 11 by the competent authority and/or the court as the case may be. That is to say, the entry
B of Tenaga is wrongful and *ultra vires* the ESA 1990.

(iii) On the facts of the case, s. 11 will not be applicable as the entry is not a first entry by Tenaga.

[27] On the facts of the case, there is no appealable error. I will dismiss the
C appeal with costs of RM25,000 to the respondent. Deposit is to be refunded.

[28] I hereby order so.

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